Q. Are there any other sanitary sewer improvements in the area other than the line you just described constructed by the Sanitation District?

A. To my knowledge there is no sewers other than that in this area. In this area, I believe they have septic tanks or some sort of private disposal system."

Appellants apparently do not understand the cooperative effort that is made between the county and city zoning boards. On Page 30 of Transcript of Evidence, Mr. Austin Mann states that he is a member of the Kenton County Planning and Zoning Commission, whose function is the planning and zoning of unincorporated area outside the City of Covington. This commission has zoning jurisdiction over the unincorporated area proposed to be annexed by the City of Erlanger. The protection afforded the residents of the territory involved in this annexation proceeding is the direct result of the present zoning regulations of the City to which this territory is contiguous.

In Transcript of Evidence, Page 31, Mr. Mann states:

"Q. Do you know whether or not this Planning commission of which you are a member, has any authority over local planning and zoning commissions? By that I am referring to the City of Erlanger?

A. They do not have.

Q. Do the two organizations work together? I mean the Kenton Zoning Commission and the Zoning and Planning of the City of Erlanger?

A. To my knowledge attempts have been made to correlate efforts and plan together.

Q. Would they take into consideration when zoning an area outside the municipality, the type of zoning there is now in the city which abuts that area?

A. Yes, blend it."

Appellants attempt to ridicule the findings of the court that the City of Erlanger is a progressive and prosperous

third class municipality. This attack by the Appellants is completely unwarranted.

C. THE TESTIMONY SHOWS BEYOND A REASONABLE DOUBT THAT FAILURE TO ANNEX WILL MATERIALLY RETARD THE PROSPERITY OF THE CITY AS WELL AS THE PROSPERITY OF THE OWNERS AND INHABITANTS OF THE TERRITORY SOUGHT TO BE ANNEXED.

The law applicable to this situation has been enunciated by the Court of Appeals on numerous instances. The cases cited by the Defendant are those which interpret the statute where more than 75% of the inhabitants of the territory sought to be annexed have remonstrated. In the case of *Park et al* v. *City of Covington,* 187 Ky. 311, 218 S.W. 986, involved the annexation of certain territory in the City of Covington which runs along the north side of 26th Street between Rogers Street and Latonia Avenue. One-half of the street in question was in the City of Covington and the other half was not. In ordering the annexation, the Court said:

> "It was further shown that the improvement of Twenty-seventh Street, by the construction of a trunk sewer, the paving of the street with granite block, the construction of sidewalks, and the bringing of gas into that part of the City, would enhance the value of the property in that section, including the property in question, from 50 to 100 per cent. On the other hand, the failure to annex the territory, which would prevent these improvements from being made, would not only retard the enhancement in price of the property in question, but would retard the growth and prosperity of the city on the opposite side of the street, since that portion of the city could not be built up until the improvements were made. In addition

to this, it was shown that the inhabitants of the territory in question enjoy the same benefits and protection from the city government that the inhabitants on the opposite side of the street now enjoy.

In view of the foregoing evidence, we see no reason to disturb the finding of the chancellor. *In our opinion, the evidence makes it clear that, if the annexation does not take place, the inhabitants of the surrounding territory will be denied many governmental privileges which they would otherwise enjoy, and that this will deter others from locating in that vicinity, thereby postponing the development of the surrounding territory and the territory in question, preventing its enhancement in price, and thus necessarily retarding the prosperity not only of the city, but of the owners and inhabitants of the territory sought to be annexed."* (Italics added.)

The court was faced with a similar situation in the City of Louisville. The importance of this case was the fact that the court defined "to retard prosperity." In the case of *Loeffler* v. *City of Louisville,* 308 Ky. 629, 215 S.W. 2d 535, the court said:

> "To retard prosperity means to delay progress. *Webster's New International Dictionary.* The prosperity of a community must be gauged by its attainments in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole."

An additional case involving the same issues, is also to be noted. In the case of *S. S. Likins et al.* v. *City of Clarkson,* 280 S.W. 2d 491, the court stated:

> "The term 'retard prosperity' means to delay progress of the community as 'gauged by its attainments

> in the many fields affecting the welfare of its inhabitants and the owners of property comprising its territorial limits. Thus economic, religious, social, educational, safety, and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole', Loeffler v. City of Louisville, 308 Ky. 629, 215 S.W. 2d 535, 536. In determining the question, the court views the situation as a whole — 'the City as an organized community and the suburban property as an unorganized community.' Masonic Widows and Orphans Home and Infirmary v. City of Louisville, 309 Ky. 532, 217 S.W. 2d 815, 819. It is apparent that each case of annexation is to be decided according to its own peculiar conditions and facts."

There can be no doubt that the City has introduced sufficient testimony to show that its prosperity would be retarded by failure to annex. Mr. Viox, City Engineer, in his testimony, part of which was referred to in earlier portions of this brief, has shown that the City is surrounded on all sides except two. One of these sides is not suitable for annexation at the present time by reason of the extremely rough condition of the terrain. The remaining territory which is suitable for annexation is the subject of this law suit.

Ample testimony was introduced to show that a majority of the utilities and improvements that are enjoyed by the inhabitants of this area are the direct result of the efforts of the City of Erlanger. The evidence further indicated that most of the expenses incurred in making these utilities available were borne by the residents of the City. The testimony shows that sanitary sewer service is in the immediate area and available for use by the residents of this territory. Mr. Viox explained that this sewer service was partly brought about by a contract entered into between the City

of Erlanger and Sanitation District No. 1 of Campbell and Kenton Counties.

Ample testimony has also been introduced to show that the water line which comes down Stevenson Road and is availabe to a portion of the residents of this area involved, was the direct result of negotiations between the City of Erlanger and the Kenton County Water Commission District No. 1. The territory in question is primarily residential in nature. This territory abuts a similar residential area in the City of Erlanger. One of the most important things to be afforded the residents of this area is zoning protection. The development of this territory as it now stands can certainly be traced to its proximity to a residential area in the City of Erlanger.

The testimony shows that the City is almost surrounded and that expansion and development will rapidly come to a standstill. The remaining area within the present corporate limits that is available for development is extremely small. Mr. Rouse, in his testimony clearly brought this problem to light.

Transcript of Evidence, Page 53:

> "Q. In your capacity as City Co-ordinator, are you familiar with the types of residences, industries and business development and construction that is going on in the city limits of Erlanger?
>
> A. I am.
>
> Q. Can you tell the court whether or not the saturation point has been reached within the corporate limits of the City of Erlanger for additional development of industry, business and residential areas?
>
> A. Mr. Riggs, the saturation point has nearly been reached.
>
> Q. Can you go to the blackboard and show the Court the area now under development and tell what that problem is?

A. Most of the development as far as subdivision is concerned now is taking place in the City of Erlanger in the southeast portion of the section of the Gripshover tract. This area is being developed principally by three developers within the City, at the present time, together with a smaller subdivision in the area bounded by Mary Street, McArthur Street and Stephenson Road are the only two large plots of ground being developed within this area of the City. The area to the northwest of the City of Erlanger is being developed also. At the present time, there is approximately 70 to 75 acres that is being developed in that particular area on a gradual basis, that is, so many homes per year. The Boone County line curtails the development in that area. In this particular area (indicating) all the area has been developed with the exception of one small section known as the Silver Lake area which runs between Hulbert, Crescent Springs and Riggs Avenue. That block of approximately 20 acres has not been developed. The City of Erlanger has been growing at the rate of approximately 100 homes a year for the past six or seven years and with the exception of the growth in those areas I pointed out, there are practically no building lots available in any number in the City of Erlanger at the present time."

Not to be forgotten in this case and equally important, is the showing that has been made that the prosperity of the inhabitants of the territory to be annexed will be materially retarded if annexation does not take place. This point has been clearly shown again by the testimony of Mr. Clyde Rouse in establishing the facilities and services that will be made available to these people. The law applicable to this point has been clearly defined by this court in the cases of *Loeffler* v. *City of Louisville* (*Supra*) and *S. S. Likins et al* v. *City of Clarkson* (*Supra*). This court has

continuously held that economic and social, safety and sanitary conditions are factors to be taken into consideration in determining the prosperity of a community as a whole. Appellees do not wish to dwell on this point since we feel the evidence speaks for itself, and clearly sustains the findings made by the Kenton Circuit Court.

The testimony on fire protection indicated that a substantial reduction in insurance rates will result. While Appellants attempt to refute this, there is no contradiction of the testimony of G. F. Pettit, insurance agent, which begins on Page 67 of the Transcript of Evidence. The testimony shows on Pages 69 and 70 of the Transcript of Evidence that as much as a $34.50 savings would result on insurance rates for a brick house located in the City and enjoying a class six insurance rate. This savings would be even larger on a frame dwelling. Other valuable services to be made available to the resident of the territory sought to be annexed include street lighting programs, a reduction in electricity rates, improved winter road service and sanding, and increased police protection. Also of substantial importance is the increase in land values that would result from the benefit of being annexed to the City.

CONCLUSION

Many of the desirable features of living in this territory are truly attributable to its proximity to the City of Erlanger, but for which such features would not be available and it is fitting for the entire area to get the full benefit of all of the City's facilities.

The Appellee respectfully submits to the court that the evidence has clearly shown that failure to annex the territory will materially retard the prosperity of the City and of the owners and inhabitants of the territory to be annexed

and that this honorable court should sustain the judgment of the Kenton Circuit Court ordering annexation.

Respectfully submitted,

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APPENDIX B

(CAPTION OMITTED)

REPLY TO PETITION FOR REHEARING COURT OF APPEALS OF KENTUCKY

STATEMENT OF FACTS

May it please the Court:

The facts in this case have been thoroughly stated, and re-stated in the previous Briefs filed by Appellant and Appellee. It is necessary at this point, however, to state that the facts to be considered in this Petition for Rehearing now pending is that this Honorable Court, having previously rendered its decision affirming the Judgment of the Second Division of the Kenton Circuit Court has now been asked to reconsider this decision in light of the constitutionality of KRS 81.230 (3).

ARGUMENT

A. KRS 81.230 (3) IS NOT UNCONSTITUTIONAL IN THAT IT DENIES THE RIGHT OF APPEAL TO FREEHOLDERS ANNEXED BY CITIES OF THE THIRD AND FIFTH CLASS AND GRANTS THE RIGHT OF APPEAL TO FREEHOLDERS ANNEXED BY CITIES OF THE FIRST, SECOND, FOURTH AND SIXTH CLASS.

Appellee, in his petition for rehearing bases his entire position on the fact that the denial of the right of appeal is a violation not only of sections 3 and 59 of the Kentucky Constitution but also of the Fourteenth Amendment of the Constitution of the United States. The entire question therefore seems to turn upon whether or not such a denial as it applies to third and fifth class cities is so arbitrary and

discriminatory as to be unequal in its application and to deny equal protection of the laws.

This Honorable Court is rendering its decision in this case on May 8, 1964, thoroughly disposed of the problem when it stated:

> "The appellants maintain that the statutory denial of an appeal in third-class city cases is unconstitutional as discriminatory, special legislation. A similar contention was made, and rejected, in *Yount* v. *City of Frankfort, Ky.*, 255 S.W.2d 632, wherein the Court cited *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089, as authority for the proposition that the legislature constitutionally may provide different methods of annexation for different classes of cities.
>
> We believe the holding in the Frankfort case is sound. Under Section 156 of the Kentucky Constitution cities may be divided into classes for the purposes of *organization and government.* Acts relating to organization and government of cities may distinguish between cities according to class without violating constitutional prohibitions against special legislation. *Mannini* v. *McFarland,* 294 Ky. 837, 172 S.W.2d 631. Annexation is a matter of organization and government of cities. *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089."

It has long been settled by this Honorable Court as well as the Supreme Court of the United States that laws or local ordinances which apply equally to all members of a class are not unconstitutional where uniform in application to all persons in the same class and under similar conditions. It is stated in 12 American Jurisprudence, Constitutional Law, Section 478, as follows:

> "If a classification in legislation meets the prerequisites indispensable to the establishment of a class that it be reasonable and not arbitrary, and be based upon substantial distinctions with a proper relation to the

> objects classified and the purposes sought to be achieved, as long as the law operates alike on all members of the class which includes all persons and property similarly situated, it is not subject to any objections that it is special or class legislation, and is not a violation of the Federal guaranty as to the equal protection of the laws."

The rule seems to be that as long as all persons within the class are treated equally there is no violation of either the Kentucky nor the Federal Constitution. In the case of *Barker* v. *Curum*, 177 Ky. 637, 198 S.W. 211 the State Legislature enacted a statute providing financial assistance for certain students to enter the State University who not only passed an examination but were also privileged to be selected and grouped into another classification by the County Superintendent. In holding such a statute unconstitutional as it discriminated as to members within the class the Court stated:

> "It is true that the statute in question creates a class, but it does not treat all of that class alike; and its vice is found in that omission. If the statute had provided that all students of a certain age who pass the required examination should be entitled to enter the University upon equal terms and conditions as to the payment of fees and other expenses, it might be said that the statute was unobjectionable. But here there is no such provision, since the class is first selected under an examination, and from that class another class is selected by the county superintendent, and the fortunate students thus arbitrarily selected are given money from the state treasury, where others who have likewise passed the required examination are required to pay their fees and traveling expenses."

B. THE STATE LEGISLATURE HAS THE CONSTITUTIONAL AUTHORITY TO IMPOSE CERTAIN LIMITATIONS UPON THE RIGHT OF APPEAL.

The appellate jurisdiction of this Court as derived from the Constitution of this State can be exercised only within the limitations contained in the Constitution. It has long been recognized that the right of appeal is not absolute. In this case of *Engle, et al* v. *Miller,* 303 Ky. 731, 119 S.W.2d, 123, it was noted that the incorporation and creation of a municipality is purely a political act and legislative function. The general assembly has conferred upon the Courts the power to determine whether or not certain facts exist regarding an enlargement or reduction of municipal territory. In the case of *Lenox Land Co.* v. *City of Oakdale,* 137 Ky. 484, 125 S.W. 1089, 127 S.W. 538, it is stated:

> "It (the Legislature) might have made the action of the municipal authorities final, but, in the lawful exercise of its power, it saw proper to provide that in certain states of case dissatisfied property owners might resist the annexation of their property. As the matter of allowing an appeal to the Courts was wholly a question with the legislature, it had the right to attach such conditions as it pleased to this privilege."

The rule applicable to this case has been clearly stated in 12 American Jurisprudence, Constitutional Law, Section 554, where it is stated:

> "Moreover, the equal protection clause does not require an appeal in a particular type of proceeding or in some particular situation, if all persons within that

> class are treated alike, although an appeal may be allowed to persons differently situated."

In this connection see *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 115 U.S. 321, 29 L. ed 414, 6 S. Ct. 57; *Saylor* v. *Duel*, 236 Ill. 429, 86 N.E. 119, 19 L.R.A.(N.S.) 377. It can therefore be clearly seen that as long as the persons within the class are affected equally then the conditions of the equal protection clause have been met. It is also stated in 4 American Jurisprudence 2d, Appeal and Error, Section 6:

> "Except to the extent that Constitutional provisions impose limitations, the legislatures of the several states and of the Federal Government have authority to abridge or extend the right to an appeal at their discretion. Even the existence of a general constitutional right to appeal does not preclude reasonable legislative regulation and control of the right, and absent specific constitutional provisions, the legislature may ordinarily determine in what cases, under what circumstances, and from what courts, appeals may be taken."

CONCLUSION

In conclusion it is obvious that the provisions of KRS 81.230 (3) do not violate the equal protections clause of the Federal Constitution nor of the State Constitution. It is to be noted that all persons in the third or fifth class cities are equally situated. All of these persons within these two groups have the same rights regarding an appeal and none of them are discriminated against nor are they differently situated with regard to their particular right of appeal. While it is true that members of different class cities are granted the right of appeal, they are not within the same class as those from whom the right is withheld.

Appellee respectfully submits to the Court that the Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

.....

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END